APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,227

EDNA G. RANDALL, Administratrix of the estate of Francis E. Randall, deceased, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided July 21, 1960

Mr. Eugene Gressman, with whom *Mr. Hyman Smollar* was on the brief, for appellant.

Mr. Anthony L. Mondello, Attorney, Department of Justice, of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General Doub*, and *Messrs. Oliver Gasch*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on the brief, for appellee.

Before EDGERTON, WILBUR K. MILLER, and FAHY, *Circuit Judges*.

EDGERTON, *Circuit Judge*: Francis E. Randall, a government employee traveling on government business, was killed in an airplane accident due to the negligence of a pilot employed by Eastern Air Lines and of a control tower operator employed by the United States. As her husband's executrix, his widow sued Eastern and agreed to a $37,500 settlement. Eastern paid the money into

court, because the United States asserted a lien for the amount it had paid the widow as compensation under the Federal Employees' Compensation Act. The District Court sustained the claim of the United States, and the widow appeals.

Section 27 of the Compensation Act, 39 STAT. 747-748, 5 U.S.C. § 777, provides that "if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner: (A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States . . . ."

It is not disputed that Randall's death was "caused under circumstances creating a legal liability in" Eastern. In our opinion the suit of the administratrix against Eastern was brought, and her settlement with Eastern was made, either wholly or partly on "behalf" of Randall's widow. The wrongful death statute of the District of Columbia forbids "payment of the debts or liabilities" of the deceased out of money recovered by an administrator because of a wrongful death. D.C.Code § 16-1203. The entire amount recovered is to be allocated "to the spouse and next of kin . . . according to the finding of damage to said spouse and next of kin." D.C.Code § 16-1201. In the absence of such a finding, the widow and the next of kin, if any, are to share in the amount accord-

ing to the statute of distribution. D.C.Code § 16-1203; see §§ 18-702 to 18-704.

It follows that the United States is entitled to the statutory refund, but only to the extent that it does not exceed the widow's share of Eastern's payment. We think it immaterial that a government employee's negligence was one cause of Randall's death. We find nothing in § 27 of the Compensation Act to suggest that when the negligence of one government employee causes an accident to another government employee for which the United States pays compensation, the beneficiary is excused from refunding the compensation to the United States out of money the beneficiary receives "in satisfaction of the liability of [an]other person." In *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 411-412, the Supreme Court upheld the right of a negligent private employer, in similar circumstances, to a refund of compensation that had been paid under the Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424, 33 U.S.C. § 901. There are cases to the same effect under similar State compensation acts; *e.g.*, *Cyr* v. *F. S. Payne Co.*, 112 F. Supp. 526, 530-531 (D.C., Conn.). These acts are not intended to allow a beneficiary what amounts to a double recovery on account of the injury or death of an employee, in order to punish his employer for the negligence of another employee.

The judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

WILBUR K. MILLER, *Circuit Judge*, dissenting: In order to set forth my theory of this case, it is necessary to make a more detailed statement of the situation, both as to law and to facts, than does the majority opinion.

When an Eastern Air Lines passenger plane was about to land at the Washington National Airport on the morn-

ing of November 1, 1949, it was struck and cut in two by a Bolivian military-type plane, and the 55 persons on board it were killed.[1] Among them was Francis E. Randall, an employee of the United States Government who was traveling on official business. He was childless and was survived by his widow, Edna G. Randall.

Generally, under the Federal Tort Claims Act,[2] the United States is legally liable to pay damages for injury to or the death of any person caused by its sole or concurring negligence. But if the decedent was a Government employee, the Tort Claims Act does not apply and the United States is not legally liable in damages. This is so because the Government's only liability for the injury or death is under the Federal Employees' Compensation Act, 5 U.S.C. § 760, 30 STAT. 744: to pay compensation at stipulated rates, first to the decedent's childless widow, and then in succession to persons of varying degrees of relationship.[3]

Because of this statutory situation, the administratrix of the estate of Francis E. Randall did not follow the

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[1] The Bolivian plane was occupied only by its pilot, who survived.

[2] 60 STAT. 842 (Aug. 2, 1946). See also 28 U. S. C. § 1346.

[3] A compensation claim was made the exclusive remedy by Section 201(b), Federal Employees' Compensation Act Amendments of 1949, 63 STAT. 861, 5 U. S. C. § 757(b):

> "The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however*, That this subsection shall not apply to a master or a member of the crew of any vessel."

example set by most of the personal representatives of the victims who filed suit in the United States District Court for the District of Columbia against Eastern Air Lines, alleging negligence in the operation of its plane, and against the United States, alleging negligence on the part of its tower operators. Randall's administratrix sued Eastern Air Lines only, and did not complain against the United States because, as we have seen, the Government is not liable in damages under the Federal Tort Claims Act or otherwise for the death of its employee during the performance of his duty, even though the death was caused by the negligence of the United States.

From the many suits filed as a result of the accident, four cases were selected to be tried to determine liability,[4] and it was stipulated in all other actions that they should be governed as to liability by the final result of those chosen to be tried. Among the cases included in the stipulation was that presently before us, which had been filed October 26, 1950, by Edna G. Randall, Administratrix of the Estate of Francis E. Randall, against Eastern Air Lines.

The test cases resulted in a final determination that Eastern Air Lines and the United States were negligent and, therefore, liable in damages for the deaths of the persons on the Eastern plane. *Union Trust Co.* v. *United States*, 113 F. Supp. 80 (D.D.C. 1953); *Eastern Air Lines* v. *Union Trust Co.*, 95 U.S. App. D. C. 189, 221 F. (2d) 62 (1955); *United States* v. *Union Trust Co.*, 350 U.S. 907 (1955); *Eastern Air Lines* v. *Union Trust Co.*, 99 U. S. App. D. C. 205, 239 F. (2d) 25 (1956), *cert. denied* 353 U.S. 942 (1957). After the final determination of its liability, Eastern Air Lines negotiated a settlement with Randall's administratrix for the sum of $37,500, which was approved by the District Court.

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[4] And other questions not pertinent here.

Soon after the fatal accident, Randall's widow had filed a claim for compensation on account of his death with the United States Employees' Compensation Commission. An award was entered May 8, 1950, giving the widow monthly compensation of $292.50 from November 3, 1949,[5] until her death or marriage. When she remarried August 31, 1954, she had received compensation in the aggregate sum of $17,165.50

Having paid the widow compensation in that sum on account of Randall's death, the United States claimed it was entitled to be reimbursed therefor out of the sum of $37,500 which Eastern Air Lines had agreed to pay to the administratrix in settlement of her suit against it, and was entitled to a lien thereon. The Government's contention was based on Section 27 of the Federal Employees' Compensation Act, 5 U.S.C. § 777, 39 STAT. 747 (Sept. 7, 1916), which is reproduced in the margin.[6] Be-

[5] The first three days are excluded by the statute.

[6] "Sec. 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payment payable to him by the United States, on account of the same injury."

cause the Government was claiming a lien upon the sum it had agreed to pay to the administratrix, Eastern Air Lines prayed for and obtained permission to pay the sum of $37,500 into the registry of the District Court to await disposition of the Government's claim. Therefore, the Government filed, in the proceeding by the administratrix against Eastern Air Lines, a petition to enforce its alleged lien; it averred that the "Plaintiff, Edna G. Randall, Administratrix of the estate of Francis E. Randall, deceased, received the sum of $17,165.50 under the provisions of the Federal Employees Compensation Act as the widow of Francis E. Randall . . . ."

After answer by the administratrix, the question was submitted on cross-motions for summary judgment. The District Court granted the motion of the Government and directed that, of the money deposited in the registry of the court, the sum of $17,165.50 be paid to the Government. The court stayed the execution of its order pending this appeal by the administratrix, which immediately followed.

As has been said, it has been judicially determined that Randall's death was caused by the concurrent negligence of Eastern Air Lines and the United States. If he had not been a Government employee, both tort-feasors would have been legally liable to pay damages. But, as he was a Government employee, only Eastern is legally liable to pay damages, and compensation must be paid by the United States. Because of the apparent compulsion of Section 27 of the Compensation Act,[7] the District Court has held that the damages paid by Eastern must be diminished by the repayment of the federally-paid compensation. The net result of the holding is that, merely because Randall was a Government employee, only Eastern pays damages and the United States pays nothing—it pays neither damages nor compensation, although it was

[7] See footnote 6.

concurrently negligent. Whether the District Court was correct in so ruling is the question presented by this appeal.

The right to exoneration from payment of compensation, which the United States claims here, depends entirely upon Section 27 of the Compensation Act; it cannot be derived from the law of torts. The literal language of Section 27 does indeed provide "That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor," and if a compensation payee collects such damages, he shall refund therefrom the compensation paid by the United States. Its language must be construed, however, in the light of its background and subsequent legislative enactments.

In 1916, when Section 27 of the Compensation Act was written, the United States was not subject to tort liability and, therefore, was not legally liable to pay damages for the injury or death of an employee caused by its sole or concurrent negligence; payment of compensation for such injury or death was provided for as a matter of grace only. It seems clear to me that in writing Section 27, Congress did not foresee the passage of the Federal Tort Claims Act, and did not anticipate that there might be, as there is here, a binding judicial determination that the Government had been negligent. Had it anticipated such a situation, Congress surely would not have intended to say that in such event the United States should not only not be liable in damages but should even be excused from the payment of compensation. That would have been putting a premium on negligence, instead of a penalty.

The word "negligence" is not used in Section 27, which speaks only of "legal liability" to pay damages. The difference is significant. It shows, I think, that in adopting the Compensation Act, Congress clung to the doctrine

of Sovereign immunity: it provided that compensation paid as a matter of grace because of the injury or death of an employee must be repaid to it out of damages collected from one who was "legally liable" therefor.

This continued to be the policy of Congress until 1946, when for the first time it provided for a general relaxation of the doctrine of sovereign immunity by the passage of the Federal Tort Claims Act. That made it possible, without special permission, to sue the United States in tort. Thereafter the Government was "legally liable" to pay damages for the injury or death of an employee caused by its sole or concurrent negligence, because the payment of compensation had not then been made the exclusive remedy against the Government for the injury or death of an employee.[8]

After the Tort Claims enactment, in cases where, as here, the United States and another had been concurrently negligent in causing the injury or death of a government employee, there was a choice of remedies: 1. a compensation claim against the United States and a suit for damages against the private tort-feasor; 2. suits for damages against the United States and the private tort-feasor.

Three years after the passage of the Tort Claims Act, and doubtless because of the situation I have just described, Congress amended the Compensation Act by adding thereto what is now Section 201(b),[9] which provides the liability of the United States under the Compensation Act with respect to the injury or death of an employee shall be exclusive.

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[8] Before the passage of the Tort Claims Act there was no occasion to provide in express terms that a compensation claim should be the exclusive remedy against the United States for negligently killing or injuring an employee, because there was no other remedy.

[9] See footnote 3.

As has been said, a compensation claim was already the only remedy against the Government for injury or death of an employee *not* caused by its negligence. So, Section 201(b) could only have been intended to withdraw the coverage of the Tort Claims Act in cases where a Government employee had been injured or killed because of the negligence of the United States, and to provide that in such cases of Government negligence the remedy should be compensation instead of damages.

Having adopted the Tort Claims Act and given general permission to sue the United States for its torts, it is not to be supposed that Congress intended to discriminate against Government employees by withdrawing the Act's coverage as to them without providing a reasonably adequate substitute for the tort liability so withdrawn. I would hold, therefore, that the legislative intent in adopting Section 201(b) was to provide that in cases of Government negligence compensation was not being awarded as an act of grace, but in recognition of governmental responsibility. Hence the award of compensation was not to be defeated and repaid to the Government merely because damages had been paid by a private tort-feasor who had been concurrently negligent.

This means, of course, that Section 201(b) had the effect of making Section 27 inapplicable to cases in which the negligence of the United States had concurred with that of a private tort-feasor. Otherwise, the result would be that in cases like this one, the compensation paid by the Government in lieu of damages for its negligence must be repaid to it from damages collected from another who was concurrently negligent. Such an incongruous result would be contrary to the spirit of the Tort Claims Act, and of Section 201(b) which I think was intended to replace it, with respect to Government employees, with a provision for non-defeasible compensation.

Because of Section 201(b), the United States is again not "legally liable" for the injury or death of an employee caused by its negligence, but is legal liability to pay compensation therefor has been made absolute by that Section, not subject to repayment from damages collected from another who was concurrently negligent. Accordingly, I would hold Section 27 should now be construed as though it read:

> "That if an injury or death for which compensation is payable under this Act is caused by the sole negligence of some person other than the United States . . . compensation received must be repaid out of damages collected."

A literal interpretation of the section would lead to this inequitable result: the United States would be required to pay compensation for the death of an employee caused by its sole negligence, but would not be required to pay it if its negligence had concurred with that of another. I am unwilling to believe Congress so intended.

Under my view of the case, it might be suggested that the sum now in the registry of the District Court should be paid back to Eastern as a credit on the damages paid by it, that is, by way of contribution from the Government. Or it might be suggested that the sum held by the District Court should go to Mrs. Randall. I am not concerned with the ultimate disposition of the money except that I am convinced the United States is not entitled to it.

I do not believe the *Pope & Talbot* case[1] is applicable here. It involved the Longshoremen's and Harbor Worker's Act, 44 STAT. 1424, 33 U.S.C. § 901 *et seq.*—not the Federal Employees' Compensation Act. Section 33 of the former (33 U.S.C. § 933) differs from Section 27 of the latter. The *Pope & Talbot* opinion did not consider the

[1] 346 U.S. 406 (1953).

question I am suggesting that, because of subsequent legislation and changed legal relations caused thereby, Section 27 no longer has the meaning it had originally. Moreover, I note the Supreme Court said in *Pope & Talbot* case, at page 411, "Hawn has agreed to refund these [compensation] payments to his employer out of his Pope & Talbot recovery." In this case, Mrs. Randall made no such agreement, nor was it required by the statute.

I would hold the United States is not entitled to repayment of the compensation which it had paid to Mrs. Randall in lieu of damages for its negligence in causing her husband's death, and of course is not entitled to a lien on the damages paid by Eastern Air Lines.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, vacated and that this case is remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Circuit Judge Edgerton.

Dated: July 21, 1960.

Separate dissenting opinion by Circuit Judge Wilbur K. Miller.

APPENDIX B

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v.

UNITED STATES OF AMERICA, APPELLEE

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Before EDGERTON, WILBUR K. MILLER, and FAHY, *Circuit Judges*.

WILBUR K. MILLER, *Circuit Judge*: When an Eastern Air Lines passenger plane was about to land at the Washington National Airport on the morning of November 1, 1949, it was struck and cut in two by a Bolivian military-

type plane, and the 55 persons on board it were killed.[1] Among them was Francis E. Randall, an employee of the United States Government who was travelling on official business. He was childless and was survived by his widow, Edna G. Randall.

Generally, under the Federal Tort Claims Act, the United States is liable in damages to the personal representative of a decedent whose death was caused by negligence. But if the decedent was a Government employee whose death occurred during the performance of his duty, the United States is not liable in damages to his personal representative. In such a case, the Government's only liability is under the Federal Employees' Compensation Act, 5 U.S.C. § 760, 39 STAT. 744: to pay compensation at stipulated rates, first to the decedent's childless widow, and then in succession to persons of varying degrees of relationship; there is no provision for the payment of compensation to the decedent's personal representative.

Because of this statutory situation, the administratrix of the estate of Francis E. Randall did not follow the example set by most of the personal representatives of the victims who filed suit in the United States District Court for the District of Columbia against Eastern Air Lines, alleging negligence in the operation of its plane, and against the United States, alleging negligence on the part of its tower operators. Randall's administratrix sued Eastern Air Lines only, and did not complain against the United States because, as we have seen, the Government is not liable in damages under the Federal Tort Claims Act or otherwise for the death of its employee during the performance of his duty, even though the death was caused by the negligence of the United States.

From the many suits filed as a result of the accident, four cases were selected to be tried to determine liability,[2]

[1] The Bolivian plane was occupied only by its pilot, who survived.

[2] And other questions not pertinent here.

and it was stipulated in all other actions that they should be governed as to liability by the final result of those chosen to be tried. Among the cases included in the stipulation was that presently before us, which had been filed October 26, 1950, by Edna G. Randall, Administratrix of the Estate of Francis E. Randall, against Eastern Air Lines.

The test cases resulted in a final determination that Eastern Air Lines and the United States were liable in damages for the deaths of the persons on the Eastern plane. *Union Trust Co.* v. *United States*, 113 F. Supp. 80 (D. D. C. 1953); *Eastern Air Lines* v. *Union Trust Co.*, 95 U. S. App. D. C. 189, 221 F. (2d) 62 (1955); *United States* v. *Union Trust Co.*, 350 U. S. 907 (1955); *Eastern Air Lines* v. *Union Trust Co.*, 99 U. S. App. D. C. 205, 239 F. (2d) 25 (1956), *cert. denied* 353 U. S. 942 (1957). After the final determination of its liability, Eastern Air Lines negotiated a settlement with Randall's administratrix for the sum of $37,500, which was approved by the District Court.

Soon after the fatal accident, Randall's widow had filed a claim for compensation on account of his death with the United States Employees' Compensation Commission. An award was entered May 8, 1950, giving the widow monthly compensation of $292.50 from November 3, 1949,[3] until her death or marriage. When she remarried August 31, 1954, she had received compensation in the aggregate sum of $17,165.50.

Having paid the widow compensation in that sum on account of Randall's death, the United States claimed it was entitled to be reimbursed therefor out of the sum of $37,500 which Eastern Air Lines had agreed to pay to the administratrix in settlement of her suit against it, and was entitled to a lien thereon. Because the Government was claiming a lien upon the sum it had agreed to pay to

[3] The first three days are excluded by the statute.

the administratrix, Eastern Air Lines prayed for and obtained permission to pay the sum of $37,500 into the registry of the District Court to await disposition of the Government's claim. Therefore, the Government filed, in the proceeding by the administratrix against Eastern Air Lines a petition to enforce its alleged lien; it averred that the "Plaintiff, Edna G. Randall, *Administratrix of the estate of Francis E. Randall, deceased*, received the sum of $17,165.50 under the provisions of the Federal Employees Compensation Act *as the widow of Francis E. Randall*. . . ." (Emphasis supplied.)

After answer by the administratrix, the question was submitted on cross-motions for summary judgment. The District Court granted the motion of the Government and directed that, of the money deposited in the registry of the court, the sum of $17,165.50 be paid to the Government. The Court stayed the execution of its order pending this appeal by the administratrix, which immediately followed.

Seizing on the fortuitous circumstance that Mrs. Randall was the widow and also the administratrix, the Government claims it is entitled to reimbursement from the damages paid the administratrix by Eastern for the compensation it paid the widow, because of Section 27 of the Federal Employees' Compensation Act, 5 U. S. C. § 777, 39 STAT. 747. That statutory provision and the related Section 26, 5 U. S. C. § 776, 39 STAT. 747, 64 STAT. 1271, are reproduced in the margin.[4]

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[4] "SEC. 26. If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary

In our view, that flaw in the Government's position is that the widow, who personally received compensation from the United States, had no right of action against Eastern, and the suit against Eastern was not brought on her behalf. It was brought by a fiduciary—the administratrix—on behalf of Randall's estate. The coincidence

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may require said beneficiary to prosecute said action in his own name.

"If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under this Act.

"The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary, and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

"Sec. 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States, on account of the same injury."

that both the widow and the fiduciary were Edna G. Randall confers no right on the United States. The Government is no more entitled to recover from the fiduciary the compensation which it paid the widow than it would be if the fiduciary happened to be a trust company.

In preparing its petition to enforce its alleged lien, the Government apparently recognized this difficulty and attempted to evade it by alleging that the plaintiff *administratrix* received compensation of $17,165.50 "*as the widow of Francis E. Randall.*" (Emphasis supplied.) Standing alone, this allegation is manifestly incorrect, as the statute does not authorize the payment of compensation to a personal representative. But the allegation does not stand alone; for exhibits attached to the Government's petition, consisting of documents from the files of the Compensation Board, show that the claim for compensation was asserted by "Edna G. Randall, an unremarried widow," that the award and payments were made to her and not to the administratrix. Thus the exhibits attached to the petition of the United States contradict its averment that the administratrix received the payments of compensation.

When there is a disparity between the allegations of a pleading and an exhibit attached to it, the exhibit will control. 2 BARRON AND HOLTZOFF § 325 (1950); *Simmons* v. *Peavy-Welsh Lumber Co.*, 113 F. (2d) 812 (5th Cir. 1940). From this it follows that the Government's allegation, as controlled by its exhibits, really was that the administratrix did *not* receive compensation as the widow. With the allegation so read, the Government's petition to enforce its alleged lien was vulnerable when attacked by a motion to dismiss or for summary judgment.

Moreover, as has already been suggested, the administratrix could not have claimed or been awarded compensation, which is an allowance to the widow or next of kin, according to the statute. Only funeral and burial expenses, not in excess of $400, may be paid to the personal representative. 5 U. S. C. § 761.

If, after Randall's debts are paid, his widow personally becomes entitled either to part or all of the remainder of his estate, it will still be true that she never had a claim against Eastern. As we have said, the fiduciary suit against Eastern was not brought on her behalf, and the reimbursement provisions on which the United States relies therefore have no application. Accordingly, the Government had no lien on the money paid into the registry by Eastern Air Lines; its petition to enforce its supposed lien should have been denied, and the motion of the administratrix for summary judgment should have been granted.

Reversed and remanded for proceedings consistent with this opinion.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

PER CURIAM.

Dated: April 21, 1960.

Order

It is ORDERED by the court, sua sponte, that the opinion and judgment of this court entered herein April 21, 1960 are vacated.

PER CURIAM.

Dated: May 10, 1960.